

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

TRINETTE ZAWADZKI,	:	APPEAL NO. C-070642
	:	TRIAL NO. DV-0700796
Petitioner-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
DAVID NOVAK,	:	
Respondent-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

David Novak, respondent-appellant, and Trinette Zawadzki, petitioner-appellee, are the divorced parents of a five-year-old daughter, Katrazyna Novak-Zawadzki (“Kat”). On July 5, 2007, Zawadzki sought a civil protection order (“CPO”) against Novak, alleging domestic violence towards Kat. Zawadzki alleged that the domestic violence against Kat had occurred on July 1 and July 4, 2007. The local public children’s services agency had investigated similar allegations three years earlier but had disposed of the case as “unsubstantiated.”

On July 1, Kat went to a park with her father and paternal grandmother from 7:00 to 7:45 p.m. and returned to her mother’s house at 8:00 p.m. According to Zawadzki, Kat began to sob when she entered the house, and she continued sobbing and was clingy while the two visited outside with a neighbor, Jill Leonard. Zawadzki and Kat returned inside to

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

get ready for bed at approximately 9:15 p.m. As Kat was taking a bath, Zawadzki observed that Kat was insistently scrubbing her genitals. She asked Kat what was wrong. At trial, Zawadzki later relayed Kat's tearful reply over an objection: "Daddy hurt me again. * * * He put his finger in my pee pee * * * [a]t the park * * * [w]hen he took me to the bathroom." Zawadzki testified that she had heard Kat repeat this allegation a short time later to a neighbor, Leslie Evelo, and then to an investigating police officer.

On July 4, Kat spent the day with her father at the Children's Museum in Cincinnati. Zawadzki testified that after Kat had returned from the visit, she had acted angry, distant, and out of character, including curling up in a fetal position on the couch for 30 minutes. And two and a half hours later, Kat had blurted out while trembling and crying that her father had hurt her again in the family bathroom at the Children's Museum. Novak's objection to this testimony was overruled.

Zawadzki stated that, on the evening of July 4, she had taken Kat to Cincinnati Children's Hospital, where April Bowlin, a social worker and a member of the hospital's child-abuse team, had interviewed Kat and evaluated her for treatment. Bowling testified Kat had told her that Novak had "stuck his finger in her pee pee" in the family bathroom at the Children's Museum. Bowlin opined as an expert that the allegations as presented were consistent with sexual abuse and necessitated further investigation, even though Kat's vagina appeared normal. The reporting form from Kat's child-abuse team was authenticated and admitted into evidence.

Over objection, Zawadzki's neighbors Leonard and Evelo testified about statements that Kat had made to them about Novak's sexual abuse. Leonard claimed that on July 1, when she had asked Kat about her visit with her father, Kat had replied, "He touched me down here," and that she had pointed to her vaginal area. Kat made the statement 15 to 45 minutes after returning from the park with her father. Leonard also

testified that Kat had seemed uncharacteristically sad, had cried, and had then paced around the yard anxiously, frequently grabbing her vaginal area.

Evelo testified that on the evening of July 1, after Kat had taken her bath, she went to the Zawadzki home. Kat, who was uncharacteristically sad and staring at the ground, told her that “[daddy] poked me in the pee-pee” * * * [t]oday at the playground, when daddy took me to the bathroom.”

In defense, Novak denied the allegations, claimed that Kat had a very vivid imagination, and argued that Zawadzki was seeking a protection order to circumvent their shared-parenting plan. Both Novak and his mother testified that Kat was crying after the July 1 visit to the park because she wanted ice cream, and that Kat had used the bathroom at the park but that Novak had not assisted her.

After the hearing, the trial court granted the CPO. On appeal, Novak now contends that Kat’s out-of-court statements to Zawadzki, Leonard, and Evelo about Novak’s sexual abuse were inadmissible hearsay, and that the court should have excluded them from evidence.

The trial court found Kat’s out-of-court statements admissible under the excited-utterance exception to the hearsay rule, as set out in Evid.R. 803(2). This ruling was not unreasonable. The circumstances surrounding the declarations, including Kat’s age, the shocking nature of the sexual abuse, the short time between the contacts and the statements, and Kat’s demeanor, supported the conclusion that Kat had made the statements while she was still under the nervous stress of excitement from the sexual abuse.² Moreover, any error by the court in admitting some or all of these statements would have been harmless in light of the other admissible evidence supporting the issuance of the CPO.

² See *State v. Duncan* (1978), 53 Ohio St.2d 215, 373 N.E.2d 1234.

Novak argues also that the admission of Kat's hearsay statements at the CPO hearing violated his constitutional right to confront the witnesses against him because Kat did not testify. But the right of a criminal defendant to confront witnesses does not apply in civil proceedings such as CPO hearings.³ Likewise, we find no merit in Novak's argument that he was denied his constitutional right to the effective assistance of counsel, as that right does not attach in such proceedings either.⁴

Finally, Novak contends that the evidence did not sustain the issuance of the CPO as to Kat. The party seeking a CPO has the burden of establishing domestic violence by a preponderance of the evidence. The record amply supports a determination that Novak had committed domestic violence against the minor child. We will not reverse the trial court's decision to grant the CPO because it was supported by competent, credible evidence.⁵ We note that evaluating the credibility of the witnesses and weighing the evidence were primarily for the trial court as the trier of fact. Accordingly, we overrule the assignments of error and affirm the trial court's judgment.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HENDON and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on August 6, 2008

per order of the Court _____.

Presiding Judge

³ See *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502, ¶4.

⁴ See *Moore v. Moore*, 5th Dist. No. 02CA00037, 2003-Ohio-1382, ¶26; *Clark v. Boals*, 5th Dist. No. 06CA104, 2007-Ohio-2319, ¶67-68.

⁵ See *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 373 N.E.2d 578.